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SUPREME COURT OF THE UNITED STATES

October Term, 1951. No. 101.

LAURA GEMBEY AND A. JOHN FIELD, EXECUTORS OF THE ESTATE OF FRANK G. GEMBEY, DECEASED, PETITIONERS,

vs.

LOUISE CHASE, BY JESSE SLATER, PROCHEIN AMI, AND LOUISE CHASE, IN HER OWN RIGHT.

ADDITIONAL BRIEF ON BEHALF OF THE ALLOWANCE OF THE WRIT OF CERTIORARI AND SUPPLEMENTAL TO BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

October Term, 1933. No. 101.

LAURA ORMSBY AND B. RUSH FIELD, EXECUTORS OF THE ESTATE OF FRANK G. ORMSBY, DECEASED, PETITIONERS,

vs.

LOUISE CHASE, BY JESSE BLYTHE, PROCHEIN AMI, AND LOUISE CHASE, IN HER OWN RIGHT.

ADDITIONAL REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI AND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR SAID WRIT.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Laura Ormsby and B. Rush Field, Executors of the Estate of Frank G. Ormsby, deceased, petitioners above named, respectfully beg leave to submit the following additional reasons and brief in support of their petition for certiorari in this case (said petition having been duly docketed on May 26, 1933), for the reason that on May 22, 1933, and after the original petition for certiorari and

supporting brief were prepared, the Supreme Court of Pennsylvania handed down its decision in the yet unreported case of

Fred Sumner, et al. v. Edith M. Brown, Executrix of the Estate of Arthur R. Brown, etc., —— Pa. ——, —— A. ——.

ADDITIONAL REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

5. The decision of the Circuit Court of Appeals that the survival of a tort action is governed by the law of the forum, is contra to and in conflict with the law prevailing in the State courts of Pennsylvania, as announced in a subsequent decision of the Supreme Court of Pennsylvania.

6. The effect given to the Pennsylvania survival statute by the Circuit Court of Appeals, and its interpretation thereof, is contrary to and in conflict with the later decision of the Supreme Court of Pennsylvania.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

ARGUMENT.

Summary.

Point D. The decision of the Circuit Court of Appeals that the lex loci delicti does not govern the question of the survival of a cause of action for a tort is contrary to a subsequent decision of the Supreme Court of Pennsylvania.

Point A. Upon a factual situation where the Supreme Court of Pennsylvania has held that a cause of action for a tort does not survive the tortfeasor's death, the Circuit Court of Appeals has interpreted the Survival Statute of Pennsylvania as permitting the cause of action to survive.

POINT D.

The decision of the Circuit Court of Appeals that the lex loci delicti does not govern the question of the survival of a cause of action for a tort is contrary to a subsequent decision of the Supreme Court of Pennsylvania.

The decision of the Circuit Court of Appeals was handed down on April 7, 1933 (R. 24). Subsequent thereto, and on May 22, 1933, the Supreme Court of Pennsylvania handed down its decision in the yet unreported case of *Fred Sumner, et al. v. Edith M. Brown, Executrix of the Estate of Arthur R. Brown, etc.*, ——Pa. ——, —— A. ——.

We append hereto as Exhibit A a true copy of the opinion of that court. The decision is flatly contra to the decision in the case at bar. In the Sumner case, as in the case at bar, the plaintiff was injured in New York as a result of the tortfeasor's alleged negligence. The tortfeasor was killed in the accident, and thereafter his surviving partner died. Subsequent to this second death, suit was instituted in a Common Pleas court in Pennsylvania against the estate of the surviving partner of the original tortfeasor. A demurrer was filed to the statement of claim upon the ground that plaintiff had not averred that the law of New York provided for survival of the common law cause of action. The lower court entered a final judgment for the defendant on the demurrer, and this was affirmed on appeal by the Supreme Court.

We submit that this conflict between the decision of the Supreme Court of Pennsylvania and that of the Circuit Court of Appeals should not be permitted to stand. The question whether or not a cause of action survives is one in which the Federal courts should follow the law as laid down by the highest appellate court in the State. A defendant's liability should not be dependent upon so fortuitous a circumstance as whether the plaintiff can institute his suit in the United States District Court in Pennsylvania.

We submit that particularly in view of the decision of the Supreme Court of Pennsylvania, a writ of certiorari should be granted in the present case, in order that this Court may review and reverse the decision of the Third Circuit Court of Appeals, and thus bring the law into harmony with the law in Pennsylvania and the great weight of authority elsewhere.

POINT E.

Upon a factual situation where the Supreme Court of Pennsylvania has held that a cause of action for a tort does not survive the tortfeasor's death, the Circuit Court of Appeals has interpreted the Survival Statute of Pennsylvania as permitting the cause of action to survive.

In its opinion the Circuit Court of Appeals cites the Pennsylvania Survival Statute, which is the *Act of March 30, 1921, P. L. 55, Sec. 35 (b)*. (R. 19). The court said:

> "In the case at bar, the legislature of Pennsylvania has provided that an action survives the death of the torfeasor and may be maintained against his executors, if it could have been maintained against him if he had lived * * *. In the instant case, suit could have been brought against Ormsby if he had lived. Therefore, it may be maintained against his

executors for it complies with the requirements prescribed by the legislature." (R. 23-24)

The Circuit Court of Appeals, therefore, interpreted the Pennsylvania statute as giving the respondent injured in New York the right to maintain an action in Pennsylvania after the tortfeasor's death. We submit that this interpretation by the Circuit Court of Appeals of a local statute is contrary to the recent decision of the Supreme Court of Pennsylvania in Sumner v. Brown, supra. In the opinion of the Supreme Court of Pennsylvania, it nowhere refers to the Act of March 30, 1921, but its very silence upon that point is in effect a decision that the act does not apply where the plaintiff was injured in another jurisdiction; and that the act cannot be interpreted to give one injured in New York the right to maintain an action in Pennsylvania subsequent to the tortfeasor's death. Substantially, therefore, the decision of the Circuit Court of Appeals interprets a local statute in Pennsylvania to give a plaintiff rights which the Supreme Court of Pennsylvania subsequently held a plaintiff does not have, and the decision of the Circuit Court of Appeals upon the interpretation of a Pennsylvania statute, accordingly, is in conflict with and contrary to the decision of the Supreme Court of Pennsylvania upon the same matter. This Court has frequently assumed jurisdiction to review and reverse a decision of a Circuit Court of Appeals upon the interpretation of a state statute which is in conflict with the decision of the highest appellate court of that state: *Sioux County v. National Surety Company* (1928), 276 U. S. 238; *Hawks v. Hamill* (1933), 288 U. S. 52.

For this further reason, also, we submit that a writ of certiorari should be granted.

CONCLUSION.

It is therefore respectfully submitted that for these further reasons also this case is one calling for the exercise by this Court of its supervisory powers, in order that the error of the Circuit Court of Appeals may be corrected, and that to such an end a writ of certiorari should be granted, and this Court should review the decision of the Circuit Court of Appeals for the Third Circuit, and finally reverse it.

LAURENCE H. ELDRIDGE,
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Attorneys for Petitioners.

EXHIBIT A.

IN THE
SUPPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT.

FRED SUMNER, FRANCES SUMNER, His Wife, *Appellants*, v. EDITH M. BROWN, EXECUTRIX OF THE ESTATE OF ARTHUR R. BROWN, SURVIVING PARTNER OF ARTHUR R. BROWN AND HARRY R. BROWN, CO-PARTNERS, TRADING AND DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF THE ATHENS MOTOR COMPANY.	No. 100. January Term, 1933. Appeal from the Judgment of the Court of Common Pleas of Bradford County to No. 161 May Term, 1932.

LINN, *J.*

This appeal is from the entry of judgment for the defendant on an affidavit of defense in the nature of a demurrer to an amended statement of claim. Plaintiff, a guest in an automobile driven by Harry R. Brown, was injured in the State of New York April 24, 1931, by reckless driving. Brown was killed in the resulting accident. At the time, he and Arthur R. Brown were partners in the business of selling automobiles and maintaining a garage in Athens, Pennsylvania. The disastrous journey

was in the ordinary course of the business of the partners. On September 8, 1931, Arthur R. Brown, died, testate. Letters testamentary were issued to his executrix by the Orphans' Court of Bradford County, Pennsylvania.

In March, 1932, to recover for personal injury, plaintiffs brought this action against "Edith M. Brown, Executrix of the estate of Arthur R. Brown, surviving partner of Arthur R. Brown and Harry R. Brown, copartners, trading and doing business under the firm name and style of the Athens Motor Company." Pursuant to section 20 of the Practice Act, the executrix objected that the statement of claim set forth no right of action either against Harry R. Brown or against Arthur R. Brown who died before suit was brought, or for which his estate was liable; that plaintiff had not averred (cf. Usher v. R. R. Co., 126 Pa. 206; 17 A. 596; Rosenzwieg v. Heller, 302 Pa. 279, 153 A. 346; Smith, Adm. v. Pennsylvania R. R. Co., 304 Pa. 294, 297, 156 A. 89) that the law of New York provided for survival against the decedent of liability for the common law cause of action: (Moe v. Smiley, 125 Pa. 136, 17 A. 228; Gorlitzer v. Wolffberg, 208 N. Y. 475.) Leave to amend the statement of claim followed. Plaintiff then amended by quoting (from the partnership statute of New York) the provisions that dissolution results by the death of a partner, that partnership continues until the winding up is completed, and that "Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership, or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act." Plaintiff also averred that the affairs of this partnership had not been wound up. Defendant then renewed her former objection and, after

hearing, judgment for her was entered on the ground that no right of action against defendant was pleaded.

Unless the law of New York provided a right of action for the tort, none exists; without a right of action, the suit must fail; if a right exists, it must be pleaded: Usher v. West Jersey R. R. Co., 126 Pa. 206, 17 A. 596; LaBar v. N. Y. etc. R. R. Co., 218 Pa. 261, 67 A. 413. The provisions quoted from the partnership statute do not provide for the continuation of the common law liability for personal injury after death of the party liable. For the wrongful act of the partner who drove the car, the property of the partnership was answerable (in the words of the statute) "to the same extent as" he was; but his common law liability had been terminated with his death: Moo v. Smiley, supra. But as agent for his co-partner, his tort likewise made the property of the partnership answerable, but this liability also terminated by the death of the surviving partner. No right of action then remains.

Appellant attempts to meet that objection by contending that the partnership is a "legal entity", responsible (in the words of her brief) "after the individual liabilities of the partners may have been terminated by their deaths;" that the entity "continues until its affairs are wound up" and that, accordingly, it is answerable for this tort, although by the common law no recovery could be had against the estates of the joint and several tort feasors. She cites decisions prior to the partnership act holding, or containing statements, that a partnership is an artificial entity, and also refers to various sections of the Pennsylvania partnership statute, said to support the 'entity' theory. Passing the failure to aver in the statement of claim that such provisions are also the law of New York, it is sufficient, for present purposes, to say that it is well known that the act was drawn and enacted to give effect, as its terms indicate, to the common law or aggregate theory that partners are joint principals in

partnership transactions, holding property as tenants in partnership, and not to give effect to the theory that the partnership is a legal or fictitious person, which owns the property, and for whom the partners act as mere agents.*

From the section of the New York law, quoted above, appellant selects the declaration that "the partnership is liable therefor to the same extent as the partner so acting or omitting to act," and contends that the word 'partnership' designates a legal or fictitious person. The argument is then made hat this person remains answerable for the personal injury in question. But the term partnership, as there used, refers to the fact that persons have associated themselves "to carry on as co-owners a business for profit" (section 6); the use of the word was not intended to establish or recognize the creation of a legal person by the mere fact of association for the purpose stated in the partnership agreement.

As no cause of action is averred in the amended statement, the judgment is affirmed.

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*See The Uniform Partnership Act, A Criticism by Judson A. Crane, 28 Harv. Law Rev. 762. The Uniform Partnership Act. A Reply to Mr. Crane's Criticism, by William Draper Lewis, 29 Harv. Law Rev. 158.

